

**BOARD OF ALIEN LABOR CERTIFICATION APPEALS
UNITED STATES DEPARTMENT OF LABOR
WASHINGTON, D.C.**

DATE: October 6, 1997

CASE NO: 96-INA-153

In the Matter of:

MULTINASH, INC.
Employer,

On Behalf of:

REZA MANSOURI-MASHIDA
Alien

Appearance: David P. Goldstein, Esq.
New York, New York,
for the Employer and the Alien

Before: Holmes, Huddleston and Neusner
Administrative Law Judges

JOHN C. HOLMES
Administrative Law Judge

DECISION AND ORDER

This case arose from an application for labor certification on behalf of Alien Reza Mansouri-Mashadi ("Alien") filed by Employer Multinash, Inc. ("Employer") pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the "Act"), and the regulations promulgated thereunder, 20 CFR Part 656. The Certifying Officer ("CO") of the U.S. Department of Labor, New York, denied the application, and the Employer and the Alien requested review pursuant to 20 CFR § 656.26.

Under § 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor ("Secretary") has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed.

Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File ("AF"), and any written argument of the parties. 20 CFR § 656.27(c).

STATEMENT OF THE CASE

On December 20, 1993, the Employer filed an application for labor certification to enable the Alien, an Iranian national, to fill the position of Designer Apparel-Middle East Wear in its Exporter Garments company.

The duties of the job offered were described as follows:

Design folklore and high fashion clothing for men, women, (including lingerie) children and accessories for export to Middle East and Gulf Countries, Estonia and Baltic States. Sketch rough detailed drawings of apparel, write specifications. Analyze middle Eastern fashion trends and predictions create new designs for apparel to suit the taste of these Middle East Gulf Countries and Baltic States, such as traditional garments appropriate to the culture of the region.

No education and four years experience in the job were required. Wages were \$635.00 per week. No employees would be supervised, and employee would report to the president. (AF-1-48)

On July 10, 1995, the CO issued a NOF denying certification, finding that the job offer did not establish full time employment, and appeared tailored to alien's background. Compliance by Employer would require documentation of: gross receipts for 1993 and 1994 and dollar amount of business and customers in "Middle East Wear"; other Fashion Designers employed and their areas of fashion expertise; copy of 1994 income tax return. (AF-50-51)

On August 10, 1995, Employer forwarded an extensive number of pages of material, including 1994 income tax return; summary of sales for 1993, 1994 and 1995; and partial list of purchase orders and invoices. (AF-55-141)

On August 29, 1995, the CO issued a second NOF, finding that employer had failed to demonstrate the need for a Designer Middle East. "Employer's documentation suggests that business activity is the export of ready-made garments purchased from various suppliers in the New York City area to customers located in the Middle East; the relevance of the employment of a Designer in this type of business operation remains unclear." Further documentation was required as set out by the CO. (AF-142-144)

On September 28, 1995, Employer forwarded his rebuttal, by counsel, explaining: "Because we do not have a full-time designer, experienced and knowledgeable of the trends and the market, we are compelled to use designers in the Middle East. However they are not capable of giving us the designs we really need. As a result, we are losing the market drastically to competition. As evidenced by the decline of our gross sales from over 7 million in 1993 to 4 million in 1994, to 2 million the first six months of 1995.." (AF-145-152)

The CO denied certification in a Final Determination, October 10, 1995, alleging that the necessity of a Designer had not been demonstrated, nor that a full time job opportunity was available.

On November 20, 1995, Employer requested review of the Final Determination by this Board. (AF-153-155).

DISCUSSION

Section 656.25(e) provides that the Employer's rebuttal evidence must rebut all the findings of the NOF, and that all findings not rebutted shall be deemed admitted. Our Lady of Guadalupe School, 88-INA-313 (1989); Belha Corp., 88-INA-24 (1989)(en banc). Failure to address a deficiency noted in the NOF supports a denial of labor certification. Reliable Mortgage Consultants, 92-INA-321 (Aug. 4, 1993).

We find that Employer has failed to establish that the job opportunity constitutes full time employment. Section 656.3 provides that "employment" means permanent, full-time work by an employee for an employer other than oneself. The employer bears the burden of proving that a position is permanent and full time. If the employer's own evidence does not show that a position is permanent and full time certification may be denied. Gerata Systems America, Inc. 8-INA-344 (Dec. 16, 1988) Further if a CO reasonably requests specific information to aid in the determination of whether a position is permanent and full time, the employer must provide it. Collectors International, Ltd. 89-INA-133 (Dec. 14, 1989). The CO gave employer two opportunities to document sales to Middle East customers in order to justify the job opportunity. In reply, Employer through counsel, merely reiterated its hope for future business if alien were hired. Employer's own description of its business employing only three

permanent employees adds further validity to the CO's request. Employer failed to furnish this documentation.

Evidence that is first submitted with the request for review will not be considered by the Board because an Employer cannot supplement the record on appeal. 20 C.F.R. 656.26(b)(4); Gnaw Auto Sales & Parts, 91-INA-352 (Dec. 16, 1992); Dharmanidhi Social Services, 90-INA-467 (Aug. 4, 1992).

ORDER

The Certifying Officer's Denial of Certification is affirmed.

For the Panel

JOHN C. HOLMES
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

**Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400
Washington, D.C. 20001-8002**

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.

Cheryl Braxton, Legal Technician

BALCA VOTE SHEET

Case Name: **Alice M. Synnott**
(**Claudia Olivera**)

Case No. : 95-INA-235

PLEASE INITIAL THE APPROPRIATE BOX.

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	:	CONCUR	:	DISSENT
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Holmes	:	:	:	:
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Huddleston	:	:	:	:
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Thank you,

Judge Neusner

Date: